



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
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DEC 18 2008

Ronald J. Tenpas  
Assistant Attorney General  
Environment and Natural Resources Division  
Department of Justice  
1425 New York Avenue, N.W.  
Washington, D.C. 20005

Re: **Ex. 5 - Attorney Client Privilege/Attorney Work-Product Privilege**  
*U.S. v. Powerine Oil Co., et al., Civ. No. 04-6435 (C.D. Cal.)*

Dear Mr. Tenpas:

**Ex. 5 - Attorney Client Privilege/Attorney Work-Product Privilege**

On February 11, 2008, the District Court for the Central District of California entered a Consent Decree between EPA and the settling defendants, Powerine Oil Company, CENCO Refining Company (now known as Lakeland Development Company), and Energy Merchant Corp (collectively, "settling defendants" or "Powerine Parties").

The Consent Decree requires the settling defendants to reimburse EPA in three installments for \$1.45 million in past costs associated with three Superfund sites. The settling defendants made the first payment, but failed to make the second and third payments according to the terms of the Consent Decree; specifically, the settling defendants made the second payment more than three months late and have not yet made the third payment, which is currently five months late. The Consent Decree states that the settling defendants will pay stipulated penalties of \$5,000 per day for any missed payments. **Ex. 5 - Deliberative Process Privilege/Attorney-Client Privilege/Attorney Work-Product Privilege**

### History of the Litigation

The United States initiated this litigation in 2004 to recover past and future response costs incurred at the Waste Disposal, Inc. (WDI) Superfund Site. Ultimately, the Consent Decree also resolved settling defendants' liabilities at two other sites, the Operating Industries, Inc. (OII) Site and the Casmalia Site.

### The WDI Site.

The 38-acre WDI Site is located in Santa Fe Springs, California, in Los Angeles County. The main feature of the Site is a buried 42-million-gallon concrete-lined reservoir, constructed in the 1920s as a petroleum storage tank. Subsequent to that use, the reservoir and surrounding

property also served as a permitted landfill and an unpermitted dump, and came to contain various wastes, including organic wastes, oil refinery wastes, solvents, petroleum-related chemicals, and other chemical wastes. The WDI Site was added to the National Priorities List ("NPL") on July 22, 1987.

#### The WDI Site Generator PRPs.

The United States has entered into settlements with all of the viable potentially responsible parties (PRPs) at the WDI Site. The settlements have fallen into three broad categories: generator, landowner, and "responsible landowner" settlements. Powerine Oil Company (Powerine) and its related entities, CENCO Refining Company (CENCO) and Energy Merchant Corp. (EMC), are liable as generators at the WDI Site; this discussion therefore focuses on the generator settlements.

In 1994 and 1997, EPA issued administrative orders for remedial design to most of the generator PRPs. Subsequently, the named generators formed a work group, known as the Waste Disposal, Inc. Group ("WDIG"). In 2003, the U.S. District Court for the Central District of California entered a Remedial Action Consent Decree between the United States and the members of the WDIG, pursuant to which the WDIG successfully completed the remedial action at the Site in September 2006. The WDIG remains responsible for all long-term operations, maintenance, and monitoring, and for the payment of EPA's future oversight costs.

#### Powerine's Liability at the WDI Site.

EPA did not include Powerine in its administrative orders or in the Remedial Action Consent Decree because Powerine had claimed an inability to pay. Powerine never joined the WDIG or otherwise participated in cleanup work at the Site. Ex. 5 - Deliberative Process/Atty. Work-Product/Atty.-Client

EPA sent a General Notice Letter to Powerine in 1987 and a Special Notice Letter in 1994. Throughout the sporadic negotiations that followed, Powerine claimed it had no ability to pay cleanup costs, Ex. 5 - Deliberative Process/Atty. Work-Product/Atty.-Client

Powerine also asserted that a 1985 approval of its bankruptcy reorganization plan discharged EPA's claims, as discussed further below. In 1998, CENCO purchased Powerine for \$14.7 million. Powerine immediately disbursed the sale proceeds, partially as repayment of various debts, but mostly as a distribution to Powerine's parent corporation and sole stockholder, EMC. Powerine once again had no assets and reasserted its inability to pay.

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On August 3, 2004, the United States filed a complaint against Powerine, CENCO, and EMC, seeking reimbursement of past and future response costs at the WDI Site pursuant to Section 107 of CERCLA, as *United States v. Powerine Oil Co., et al.*, Civil No. 04-6435 (C.D. Cal). The United States also alleged that Powerine had fraudulently conveyed funds to EMC, under the Federal Debt Collection Procedures Act, 28 U.S.C. §§ 3001-3308, and that Powerine and EMC had failed to respond to information requests in a complete and timely manner, as required by Section 104(e) of CERCLA, 42 U.S.C. § 9604(e).

### The OII Site.

The OII landfill is a 190-acre Superfund site located at 900 Potrero Grande Drive, Monterey Park, California, in a suburban area of Los Angeles County. The landfill operated from 1948 to 1984 and accepted solid and liquid industrial and municipal wastes. The landfill contains a wide variety of hazardous substances, and received hundreds of millions of gallons of waste from approximately 4,000 manifested entities.

Powerine contributed 4.8 million gallons of liquid waste to the OII Site and is therefore considered to be a "Major" PRP. As part of its settlement strategy, however, the United States decided to extend to certain Majors—specifically, those who had contributed less than 5 million gallons of liquid waste—the option of obtaining a de minimis covenant without the standard reopeners for new information and unknown conditions. On this basis, the United States offered Powerine a settlement that included a de minimis covenant. The cost to Powerine of participating in OII CD-8 would have been approximately \$5 million to \$6.5 million, depending on whether it opted to eliminate reopeners or not. Ultimately, Powerine chose not to participate in CD-8 at all, relying again on its inability to pay and its claim of bankruptcy discharge.

### The Casmalia Site.

The former Casmalia Hazardous Waste Disposal Facility, located at NTU Rd-539 San Ysidro Blvd., in Casmalia, California, operated from 1973 to 1989 and accepted approximately 5.6 billion pounds of waste material during that time. From 1980 to 1989, the Site had a permit to operate under "interim status" pursuant to RCRA, 42 U.S.C. § 6925(e). Because of continuing deficiencies in operations, EPA never granted the facility a final RCRA permit. More than 10,000 entities, including businesses, individuals and state and federal governmental entities, disposed of waste at the Site.

Powerine sent 813,024 pounds of waste to the Casmalia Site, which puts Powerine in the de minimis category of PRPs at Casmalia. As such, Powerine received an offer to enter into an Administrative Order on Consent with other de minimis PRPs in 1999. At that time, EPA gave Powerine the opportunity to settle its Casmalia Site liability and receive a de minimis covenant for \$93,394, the amount EPA had determined to be Powerine's fair share of Casmalia Site costs. Powerine responded that it did not have the ability to pay the stated sum and claimed that, in any event, it was not liable for costs because the waste it sent to Casmalia was covered under the petroleum exclusion from liability. Ex. 5 - Deliberative Process/Atty. Work-Product/Atty.-Client [REDACTED] removal activity is ongoing and EPA has not yet selected a remedy.

### The Consent Decree

After filing the complaint, EPA and DOJ engaged the Powerine Parties in settlement negotiations. Ex. 5 - Deliberative Process/Atty. Work-Product/Atty.-Client The Powerine Parties continued to assert their inability to pay and, at the same time, continued to provide requested financial documentation. Ex. 5 - Deliberative Process/Atty. Work-Product/Atty.-Client [REDACTED]



██████ Negotiations continued for over three years before the Powerine Parties' agreed to a settlement amount ██████ Ex. 5 - Deliberative Process/Atty. Work-Product/Atty.-Client. Near the end of the negotiations, the Powerine Parties insisted that the Consent Decree would have to address their liability at OII and Casmalia, in addition to the WDI Site.

The Consent Decree documents a cash-out settlement with Powerine, CENCO, and EMC, and resolves those entities' liability at the three Superfund sites. In Section V of the Consent Decree, the Powerine Parties agreed to pay \$1.45 million dollars in three installments: \$1 million within 90 days of the CD's entry date (May 12, 2008), and two payments of \$225,000 (plus interest), due 150 days (July 10, 2008) and 210 days (September 9, 2008) after the entry date, respectively. ██████ Ex. 5 - Deliberative Process/Atty. Work-Product/Atty.-Client ██████

██████ In addition to these payments, the Powerine Parties would covenant not to sue the United States, as well as de minimis and de micromis parties at OII, and de micromis parties at Casmalia. The covenants for the OII and Casmalia Sites would be nearly identical to the equivalent language in OII CD-9 and the most recent Casmalia administrative order on consent, respectively.

In exchange for the payments and covenants, the Powerine Parties received from the United States a covenant not to sue or take administrative action pursuant to Sections 106 or 107(a) of CERCLA or Section 7003 of RCRA with respect to any of the three included sites. The United States also received permission from the natural resources trustees (DOI and NOAA) to waive possible future claims for natural resources damages at WDI. The United States provided a standard reservation of rights, reserving the right to pursue the Powerine Parties for the following: (a) liability for failure to meet a requirement of the consent decree; (b) liability arising from the disposal of any waste material at the WDI Site or the OII Site after the date the Powerine Parties sign this Consent Decree; (c) liability arising from the past, present, or future disposal of waste material at the Casmalia Site from a facility not designated in the Casmalia Site database as a Powerine facility; (d) liability arising from the past, present, or future disposal, release, or threat of release of waste material outside of the WDI Site, the OII Site, or the Casmalia Site; and (e) criminal liability.

The Consent Decree specified the following distribution of the settlement funds: \$100,000 to the OII Site Special Account; \$93,394 to the Casmalia Site Escrow Account (equal to Powerine's allocated share at the Casmalia Site); and \$1,256,606 plus accrued interest to the WDI Site Special Account.

The proposed consent decree also included three State of California agencies—the California Department of Toxic Substances Control, the Central Coast Regional Water Quality Control Board, and the Department of Fish and Game. The Powerine Parties agreed to pay the three agencies a total of \$40,000 and received from the State covenants and contribution protection for all three sites.

Payment history. As noted above, the Powerine Parties agreed to pay \$1.45 million dollars in three installments. They made the first payment on May 13, 2008, which was technically one day late, but their counsel, Albert Cohen, notified Karl Fingerhood (DOJ, ENRD, EES) in advance,

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The second payment, however, was due on July 10, 2008, and the Powerine Parties failed entirely to make the payment. Ex. 5 - Attorney Client Privilege/Attorney Work-Product Privilege

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October 20, 2008. On that date, DOJ finally received payment for half of the past due amount, or the equivalent of the July payment, plus interest: \$231,643.40. The final payment under the Consent Decree remains outstanding Ex. 5 - Attorney Client Privilege/Attorney Work-Product Privilege

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Thank you for your attention to this matter.

Sincerely,

*Keith Takata*

Keith Takata  
Division Director, Superfund Division

Enclosures:

Letter from Fingerhood to Cohen, Sept. 10, 2008

Letter from Iliscupides to Cohen & Pappa, Sept. 19, 2008

Consent Decree, *U.S. v. Powerine Oil Co.*, et al., Civ. No. 04-6435 (C.D. Cal. Feb. 11, 2008)  
(w/Appendices A & B)

cc: Karl Fingerhood, DOJ